STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Elizabeth L. Gleicher, and Anica Letica

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DAVID R. SANDERS and
HEATHER H. SANDERS,

Plaintiffs-Appellees,

v

TUMBLEWEED SALOON, INC,

Defendant-Appellant,

and

SHAWN SPOHN and ZACHARY PIERCE, and
PAINTER INVESTMENTS, INC, doing business as
CHAUNCEY'S PUB,

Defendants.

Supreme Court Docket No.: 158789

Court of Appeals No. 338937

Montmorency Circuit Court
Case No. 16-003949-NO

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PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

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STATEMENT OF JURISDICTION

Michigan Court Rules 7.303(B) and 7.305(C)(5) provide this Court with discretion to review the Court of Appeals decision in this matter.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision regarding a motion under MCR 2.116(C)(8) and (10). This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **HAS APPELLANT PRESENTED SUFFICIENT GROUNDS FOR THE APPLICATION FOR LEAVE TO APPEAL TO BE GRANTED PURSUANT TO MCR 7.305(B)?**

Plaintiffs-Appellees answer: "No"

Defendant-Appellant will answer: "Yes"

II. **DID THE COURT OF APPEALS PROPERLY DETERMINE THAT A MATERIAL QUESTION OF FACT EXISTS AS TO WHETHER AN ATTORNEY-CLIENT RELATIONSHIP WAS CREATED BY THE UNILATERAL MAILING OF A LETTER BY AN ATTORNEY TO THE TUMBLEWEED SALOON, WITHOUT THE KNOWLEDGE, CONSENT, OR AUTHORIZATION OF THE PLAINTIFFS, OR ANY AGREEMENT REGARDING REPRESENTATION?**

Plaintiffs-Appellees answers: "Yes"

The Court of Appeals answered: "Yes"

Defendant-Appellant will answer: "No"

INDEX OF EXHIBITS

INTRODUCTION AND THE PARTIES

On December 2, 2014, Plaintiff David Sanders was brutally beaten in front of his wife by Defendant Shawn Spohn and his nephew Defendant Zachary Pierce (hereinafter collectively, the "allegedly intoxicated persons" or "AIPs"), outside of Chauncey's Pub in Hillman, Michigan (the Pub is owned and operated by Defendant Painter Investments, Inc and may hereinafter be referred to as "Chauncey's Pub" or the "Pub"). Within a span of less than two hours on his 21st birthday, Pierce became black-out drunk at Chauncey's Pub and was kicked out, then was taken to the Tumbleweed Saloon down the street (hereinafter, "Tumbleweed" or the "Highway") – where he was served more alcohol and kicked out of again – before returning to Chauncey's Pub where both he and Mr. Pierce attacked Mr. Sanders.

After drinking between five to nine servings of alcohol in approximately one hour, Pierce and Spohn began yelling at Chauncey's Pub bartender to turn up the music, which demand was denied. The bartender told them to go to the Tumbleweed and an off-duty employee, Michelle Sanders, walked them down the street in order to obtain more alcohol and avoid escalation of the disruptions at Chauncey's Pub. At the time, Pierce was so intoxicated that Michelle Sanders thought he was under the influence of other drugs.

Pierce vomited on the short walk to the Tumbleweed where, despite their obvious intoxication, bartender Michael Solonika served the AIPs one shot of alcohol and a beer. Solonika admitted to the AIPs that they were too intoxicated to be drinking and he eventually kicked them out after they refused to stop wrestling at the bar. Solonika later destroyed a written statement concerning this event at the direction of his boss and

Tumbleweed owner during the pendency of this lawsuit. During the return walk to Chauncey's Pub, Pierce was harassing Michelle Sanders and sexually propositioned her as he trapped her against the door of the Pub, causing her to fear for her safety.

Despite being asked to leave Chauncey's Pub again after their return, and acting "violent" according to Michelle Sanders, Pierce remained for 15 minutes until finally exiting. Once outside, he began smashing a truck with a flagpole. Mr. Sanders, who was having dinner with his wife, Heather, went outside after hearing the noise, and the AIPs viciously attacked and began beating him, mistakenly believing that Sanders owned Chauncey's Pub.

As a result of the assault, David Sanders suffered a traumatic brain injury, a SLAP tear of his shoulder involving the superior glenoid labrum, and contusions to his head and face.

After the assault, Plaintiffs contacted Mr. Samuel Meklir of Sommers Schwartz, PC to ask whether he would be interested in pursuing the case. The Plaintiffs told this to Mr. Meklir, who stated that he would need more factual background to evaluate the matter. The Sanders left this consultation without signing a representation agreement, without agreeing that Meklir would be the Sanders' attorney in the case, without reaching any agreement on fees, and without any agreement or understanding that Mr. Meklir would be taking any actions on their behalf. Nonetheless, without any prior knowledge, agreement, or approval from the Plaintiffs, Mr. Meklir sent a letter to Highway Bar requesting that it retain any video footage from the night in question. Shortly afterwards, Mr. Meklir suggested to the Plaintiffs that they hire an attorney in Northern Michigan.

Plaintiffs thereafter retained their current counsel to pursue claims against the Defendants arising out of the beating. A complaint was then filed against several Defendants alleging assault, battery, Dram Shop Act violations, negligent supervision and training of employees, willful and wanton misconduct, premises liability, and loss of consortium.

In the trial court, Defendants' concurrent Summary Disposition Motions argued that Plaintiffs had failed to provide the proper statutory 120-day notice after entering an attorney-client relationship with Mr. Meklir, thereby barring Plaintiffs' Dram Shop Act claims. Defendants also argued that Plaintiffs' separate claims of negligence – including failure to supervise its employees and failure to summon police -- were improper and should be dismissed. The Court granted both Defendants' Summary Disposition Motions.

Plaintiff thereafter appealed to the Court of Appeals. After oral argument, the Court of Appeals held in an unpublished decision that David and Heather Sanders had not entered into an attorney-client relationship with Mr. Meklir. In ruling that there had been no meeting of the minds, the Court determined that David and Heather Sanders did not have a subjective belief that an attorney client relationship had been established with Mr. Meklir, and that a mere consultation by a potential client followed by a unilateral act of the attorney is insufficient to bind the client, without even a modicum of mutual assent or reliance on legal advice given by an attorney. Defendant-Appellant's Application followed.

Appellant fails to present a sufficient basis to grant this Application for Leave to

Appeal pursuant to MCR 7.305. Instead, Appellant asks this Court to rule that a unilateral, unauthorized act by an unretained attorney can be imputed to a potential client, and cause them to forfeit important and substantial statutory rights. Granting this Application and the relief requested by Appellant would require this Court to undercut the longstanding principles of agency and formation of the attorney-client relationship.

COUNTER - STATEMENT OF FACTS

A. PIERCE INTENDED TO GET VERY DRUNK TO CELEBRATE HIS 21ST BIRTHDAY

On December 2, 2014, Shawn Spohn invited his nephew Zachary Pierce out for a night of drinking to celebrate Pierce's 21st birthday. It was Pierce's goal to get drunk that night. Pierce Trans, 70:17-18, attached as **Exhibit 1**.

Pierce became intoxicated quickly. "It was a crazy night." *Id* at 18:21. The AIPs drank a pitcher of light beer and a shot of liquor at Chauncey's Pub, Pierce "took a little break because I was feeling pretty – pretty drunk." *Id* at 41:23-25. The 150-lb Pierce then shared a second pitcher of beer. *Id* at 40:1. Pierce admitted in a police report that he drank two additional shots of liquor. *See* Voluntary Statement attached as **Exhibit 2**. After the second pitcher was finished, Michelle Sanders asked the bartender to give Pierce a birthday shot. Pierce Trans at 39:5.

B. CHAUNCEY'S PUB SERVED HARD LIQUOR TO PIERCE AFTER HE COULD NOT STAND AND WAS PHYSICALLY HARASSING ANOTHER PATRON

Michelle Sanders, a waitress at Chauncey's Pub, was sitting at the bar on her day off. Michelle Sanders Trans, 7:1 attached as **Exhibit 3**. Pierce began harassing Michelle

Sanders. Michelle thought Pierce was intoxicated on drugs. *Id* at 57:1. Heather Sanders noticed that Pierce "was trying to kiss on [Michelle]. **And she was, like -- you know, tried to push him away and everything."** Heather Sanders Trans, 37:6-9 attached as **Exhibit 4**. He then received a birthday shot from Pub bartender. *Id* at 18:1-10. Before drinking the last shot, Pierce had to sit down again. "**A: I was hot and drunk** […] **I went and sat down, because it – I was drinking, and I needed to sit down."** *Id* at 42:15-21.

C. SPOHN WAS ALSO VISIBLY INTOXICATED, VULGAR, AND YELLING AT CHAUNCEY'S PUB

Shawn Spohn was also visibly intoxicated that night. Spohn began yelling at Chauncey's Pub employee Denna Welsh after she refused to turn up the jukebox. Michelle stated that Spohn was rude, loud, and yelling at Welsh. Michelle Sanders Trans, 54:4-55:5. Spohn called Welsh, "you fat fucking bitch." Michelle Sanders Letter, attached as **Exhibit 5**.

The Pub bartender told Spohn and Pierce to leave and go down to the Tumbleweed. Denna Welsh Trans, 24:1-4, attached as **Exhibit 6**. Michelle Sanders then took the AIPs to The Highway. "I was just trying to avoid a situation at my workplace." Michelle Sanders Trans at 26:2. "**Q** You had your employer in mind? **A Right**." *Id* at 26:4-5.

D. PIERCE WAS SO INTOXICATED HE VOMITED ON HIS WAY TO TUMBLEWEED SALOON

As Pierce left, **"I went outside and I puked, and I went down – started walking to The Highway."** Pierce Trans, 48:23-24. The Tumbleweed Saloon/Highway is five

hundred feet away from Chauncey's Pub and a two-minute walk.

E. TUMBLEWEED BARTENDER ADMITTED THAT THE AIPS WERE INTOXICATED PRIOR TO SERVING THEM ALCOHOL

At the Tumbleweed, its bartender Michael Solonika knew the AIPs were too drunk and limited them to one drink. **"We went down [to The Highway] and they said – they knew we were too drunk, you know."** Pierce Trans, 48:23-49:3. Pierce had "a couple drinks of the beer." *Id* at 52:4-5. **"I believe the bartender said we could only have one."** *Id* at 54:15-16. Highway Bartender Michael Solonika admitted to serving them "a beer and they ordered a shot a piece." Michael Solonika Trans, 9:4-14, attached as **Exhibit 7**. Before finishing their drinks, the AIPs started "wrestling around" and were asked to leave after they refused to stop wrestling a second time. *Id*.

F. DESPITE THE PHYSICAL HARASSMENT, CHAUNCEY'S PERMITTED THE AIPS TO REMAIN ON THE PREMISES FOR 15 MINUTES WITHOUT CALLING THE POLICE

Outside Chauncey's Pub, Pierce trapped Michelle Sanders in the doorway, asking for a kiss. Michelle Sanders statement of 1-12-16, attached as **Exhibit 8**. She feared for her safety. *Id* at 33:1-2. When she was finally let inside, Pierce asked for another beer and was denied service. **Exhibit 8**. Spohn became "very angry." *Id*. Pierce "became violent, yelling at [the bartender.]" *Id*. Ivan Hansen, a patron of Chauncey's Pub also witnessed the outburst: "there was a little bit of a ruckus to get them out [again]." Ivan Hansen Trans, 8:8-12, attached as **Exhibit 9**.

G. THE AIPS THEN SAVAGELY BEAT DAVID SANDERS IN AN UNPROVOKED ATTACK

After the AIPs left Chauncey's Pub, they started smashing a vehicle with a wooden flag pole. David Sanders, who was having dinner with his wife Heather, went outside after hearing the noise. The AIPs savagely attacked and stomped on Mr. Sander's head, apparently believing him to be the owner of Chauncey's Pub. "The tall man grabbed David, threw him to the ground and began kicking him in the head repeatedly on the sidewalk." **Exhibit 5**. Pierce also admitted to tackling Mr. Sanders. Pierce Trans, 59:25; 60:15. The Pub bartender eventually called 911 during the beating. Heather Sanders Trans, 57:22-23. Mr. Sanders was taken to the Alpena Regional Medical Center emergency room, and was later diagnosed with a traumatic brain injury, SLAP tear of the shoulder labrum, bilateral peroneal neuropathy of the legs, and exacerbation of migraine headaches, among other injuries.

H. PLAINTIFFS DID NOT RETAIN MR. MEKLIR TO PURSUE DRAM SHOP CLAIMS

After the assault, the Plaintiffs talked about the incident with attorney Sam Meklir, who had represented Heather Sanders in an unrelated matter some years earlier. Heather Sanders Trans, 28:11-12. Both Mr. Meklir and the Plaintiffs agree without contradiction that no representation agreement was signed at that meeting; nor did the parties agree orally that Mr. Meklir would represent the Plaintiffs in connection with claims arising from the incident. After that meeting -- *without any prior knowledge, authorization, or agreement from David or Heather Sanders* -- Mr. Meklir sent a letter to the Tumbleweed Saloon asking it to preserve video footage of the incident. See **Exhibit 10**. Ultimately, Mr.

Meklir declined to represent the Plaintiffs, and suggested to them that they retain counsel from northern Michigan. David Sanders did not retain Mr. Meklir: "**I didn't retain -- I didn't retain him. I didn't sign no papers with him. I didn't retain nothing with him. Q** You never retained him? **A No. I talked to him, but that was it.**" David Sanders Trans, 41:10-13, attached as **Exhibit 11**. David was entirely unaware of the letter that Mr. Meklir had sent to the Tumbleweed. *Id* at 42:8. Heather Sanders also denied that an attorney client-relationship existed:

> **Q** Have you ever sued anyone before, ma'am?
> **A** **I had a lawsuit when I had my daughter.**
>
> **Q** Was that birth-related?
> **A** **Yes.**
>
> **Q** Okay. Did you and David retain another attorney in Southfield to initially pursue this action?
> **A** **That was my original lawyer.**
>
> **Q** Yeah.
> **A** **Yes.**
>
> **Q** Who was that?
> **A** **Sam Meklir.**
>
> **Q** Okay. Is Mr. Meklir the one that interviewed -- or that represented you and your -- through your daughter in the birth case?
> **A** **Yes.**
>
> **Q** Okay. And did you and David retain him to help you out in this case?
> **A** **We basically worked our way up here. He showed us where to go, who to see.**

Q But you initially went to see him; right?
A **Yes.**

Q *Did you retain him?*
A ***No.***

Heather Sanders Trans, at 28:9 – 29:6.

Mr. Meklir has signed and submitted an affidavit stating in relevant part: "7. No retainer agreement was ever drafted or signed regarding this incident. 8. At no time did I ever represent the Sanders regarding the personal injury claim that involved the assault on Mr. Sanders." That Affidavit of Sam Meklir is attached hereto as **Exhibit 12.**

The Circuit Court nonetheless granted Defendants' Motions for Summary Disposition, on the basis that Plaintiffs entered into an attorney-client relationship with Mr. Meklir, and his letter was insufficient notice under the Dram Shop Act, MCL 436.1801(4). Further, the trial court held that Plaintiffs' claims of negligent supervision, willful and wanton misconduct, and failure to summon police claims were preempted by the Dram Shop Act.

ARGUMENT

I. APPELLANT HAS NOT PRESENTED A SUFFICIENT BASIS TO GRANT THE APPLICATION UNDER MCR 7.305(B)

Appellant fails to demonstrate that this dispute satisfies the Michigan Supreme Court's prerequisites for justiciability. MCR 7.305(B) requires the Application to present grounds warranting an appeal.

A. The Application Does Not Establish Sufficient Public Interest Involving A State Actor.

This Application cannot be granted on the grounds of "significant public interest" because the case does not involve a state actor as required by MCR 7.305(B)(2).

B. The Application Does Not Establish An Alteration Of The State's Jurisprudence Required By MCR 7.305(B)(3).

Contrary to Appellant's claims, the Court of Appeals decision does not alter this state's jurisprudence regarding the formation of attorney-client relationships – the decision is consistent with established law. Appellants have cited no controlling or persuasive authority for the proposition that a unilateral communication by an attorney to a third party, made without the knowledge, authorization, or consent of a potential client, and without a written or oral agreement that the attorney will represent the potential client, constitutes a "meeting of the minds" under Michigan law sufficient to prejudice important rights and remedies granted explicitly to the Plaintiffs by Michigan statute. The authorities cited by the Court of Appeals in Section III.B of its opinion are straightforward, clear, and accurately described. As the Court of Appeals itself stated in *Scott v Green*, 140 Mich App 384, 400; 364 NW2d 109 (1985), "*[A] unilateral act is not sufficient to create an attorney-client relationship, the attorney-client relationship being based in contract.*" This case involves the unilateral act of Mr. Meklir; it cannot be said that the Court of Appeals has deviated from existing law, or created new law out of whole cloth.

C. The Application Does Not Demonstrate Existence of Clear Error and Material Injustice Required by MCR 7.305(B)(5).

Finally, Appellant fails to articulate how the Court of Appeals' decision was

"clearly erroneous" and will cause a "material injustice." A determination is "clearly erroneous" when, "on review of the whole record, the Court is left with the definite and firm conviction that a mistake has been made." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996). Appellant has not presented any evidence of clear error or obviously unfair application of common law principles regarding the formation of an attorney-client relationship. This is, perhaps, why Appellant's Application discusses the ethical issues implicated by Mr. Meklir's claim of representation to the Tumbleweed, rather than Michigan law regarding the mutual assent necessary for an attorney-client relationship. Whether or not Mr. Meklir's statements implicate any rules of ethics or professional conduct, however, is not a proper subject of this Application.

Moreover, the only material injustice presented by the question before the Court is in the trial court's decision. The Legislature has, through the Dram Shop Act, determined that those who are licensed to serve alcohol must bear the risk of liability if they breach their duty not to serve those who are already visibly intoxicated. The Legislature has also explicitly created a private cause of action to those who are harmed by a breach of this duty. Agreeing with the Appellants' position would wreak a substantial and material injustice on the only people involved with this matter who are inarguably blameless – David and Heather Sanders. After being savagely beaten without provocation or justification, David Sanders consulted with an attorney. He did not intend to hire that attorney, and did not sign a representation agreement. He did not authorize the attorney to hold himself out as David's counsel, or to identify himself to third parties as David's attorney. To bar David's Dram Shop Act claims due to the unilateral acts of a

third party of which *David had no knowledge whatsoever*, would abrogate important substantive rights and remedies that Michigan has explicitly created for him. Reversing the Court of Appeals would *cause* a material injustice, and not remedy one.

Without having established a significant public interest, an alteration of or conflict within Michigan law, or a clear error or material injustice, the Application should be DENIED pursuant to MCR 7.305.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT MR. MEKLIR'S UNILATERAL AND UNAUTHORIZED CORRESPONDENCE DID NOT CONCLUSIVELY ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP WITH DAVID SANDERS

A. An Attorney-Client Relationship Cannot Exist Without a Modicum of Knowledge or Reliance By the Client

Appellant cannot establish the requisite agency relationship necessary to hold David Sanders responsible for Mr. Meklir's statements. "The rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship." *Macomb Co Taxpayers Ass'n v Lanse Creuse Public Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997) (emphasis added). Appellant has made no showing that David Sanders relied on Mr. Meklir's legal advice or was even aware of any action purportedly taken on David's behalf. To the contrary, the facts establish that Mr. Sanders engaged in nothing more than a "consultation and investigation" with Mr. Meklir, akin to an attorney stating during a consultation that a tort victim should obtain a medical evaluation for a No-Fault Claim. *Kopulos v Scott*, unpublished *per curiam* opinion of the Court of Appeals, issued February 17, 2011 (Docket No. 295766) at *2, attached as **Exhibit 13**.

While Mr. Meklir's letter to the Tumbleweed is atypical for a consultation and investigation, it cannot be conclusive proof of the "meeting of the minds" necessary to establish an attorney-client relationship under Michigan law, for the simple reason that it was inaccurate – a fact amply supported by the other evidence and circumstances of the case. Moreover, there was no prejudice to the Defendants by the sending of the letter – if anything, it benefitted them by placing them on earlier notice of the potential Dram Shop Act claims, than they would have received in the absence of any consultation with Mr. Meklir. In any event, the evidence established that David Sanders did not believe that he was represented by Mr. Meklir. While it could be argued that the letter is circumstantial evidence of Mr. Meklir's belief in a representation relationship, despite his explicit disavowals of that belief, the Court of Appeals has held that a party's "mere subjective belief that [the attorney] was representing him was insufficient to create an attorney-client relationship." *Id*.

In this case, neither party to the supposed contract even had a subjective belief that an attorney-client relationship existed. David Sanders's testimony as to his intent and understanding is crystal clear: "I didn't retain -- I didn't retain him. I didn't sign no papers with him. I didn't retain nothing with him. **Q** You never retained him? **A No. I talked to him, but that was it.**" David Sanders Trans at 41:10-13. The evidence does not even arguably support a finding that David or Heather Sanders and Samuel Meklir had a mutual understanding that Mr. Meklir represented them in this matter, or that the Sanderses relied on any legal advice given by Mr. Meklir. *See Macomb Co Taxpayers Ass'n*, 455 Mich at 11; *Case v Ranney*, 174 Mich 673, 682; 140 NW 943 (1913).

B. An Attorney-Client Relationship Is Not Created By the Unilateral Act of the Purported Agent

Appellant does not cite any authority for the proposition that an agent may bind a principal without any knowledge by the principal. "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him." *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich. 540, 558; 581 N.W.2d 707 (1998) (internal citations omitted). Appellants argue that whether Mr. Sanders ever authorized Mr. Meklir's letter is "irrelevant." This argument, and not the decision of the Court of Appeals, represents a radical departure from settled law of agency in Michigan, and would present a significant risk to nearly everyone with the capacity to enter into contracts in Michigan. An agency relationship with the potential to bind a principal must include the principal's right to control – not to mention merely know of - the conduct of the agent with respect to matters entrusted to the agent. If Mr. Sanders is to be prejudiced by the acts of an agent or representative, there must be some quantum of knowledge or assent to those acts. *See Macomb Co Tax Payers*, *supra* at 11; *Kopulos*, *supra* at *2. A purported client must "reasonably believe[] an attorney-client relationship has been created," which has not occurred here. *Dalrymple v Nat'l Bank & Trust Co of Traverse City*, 615 F Supp 979, 983 (WD Mich 1985). Appellant cannot rely on the Meklir letter to create an attorney-client relationship because "a unilateral act is not sufficient to create an attorney-client relationship, the attorney-client relationship being based in contract." *Fletcher v Bd of Ed of School Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948). Appellant's citation to *McNeill-Marks* also supports Mr.

Sander's position because a "lawyer is an agent, to whom clients entrust matters […]" *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851 (2018) (ZAHRA, J, dissenting at p 8) (emphasis added). Appellant fails to produce any evidence that Plaintiffs entrusted Mr. Meklir with their case, or performed any act that could be construed as the exercise of control by a principal.

C. Appellant's Estoppel Argument Fails Because Mr. Sanders Cannot Be Bound By Unilateral and Unauthorized Representations of Mr. Meklir

Appellant does not offer any authority for its argument that Mr. Sanders is estopped from asserting that Mr. Meklir cannot offer evidence of his belief or intent with respect to the attorney-client relationship. Appellant's case law only concerns the contradiction of prior sworn deposition testimony, and not an extra-judicial correspondence. More importantly, Appellant sidesteps the uncontroverted evidence that Mr. Sanders did not know of, authorize, or agree with Mr. Meklir's decision to draft a letter asserting representation. As such, the non-binding cases like *Greycas* and *George* cited by Appellant are inapposite, as those cases both involved attorneys who acted with some knowledge and/or direction of the client.

D. Appellant's Argument that the No-Contradiction Rule Renders Mr. Meklir's Affidavit Inadmissible or Otherwise Incompetent Is Without Support

Appellant's arguments and authorities do not support the proposition that Mr. Meklir's affidavit -- the only sworn testimony from him in the record -- is inadmissible, or that it constitutes anything other than a clarification and explanation of his letter to the Tumbleweed. *See Wallad v Access BIDCO, Inc*, 236 Mich App 303, 312-313; 600 NW2d 664

(1999). Regardless of whether the affidavit is admissible or not, however, the fact remains that Mr. Meklir was not entrusted with any legal matter by David Sanders. Nor did David Sanders rely upon any advice of Mr. Meklir's, or upon a subjective belief that Mr. Meklir had been retained. Nor does Appellant offer any authority in support of the idea that the Michigan Rules of Professional Conduct estop an attorney from denying a prior extra-judicial statement – especially when that estoppel would materially prejudice a blameless third party in the exercise of statutorily-granted rights and remedies.

E. Heather Sanders Has Pled A Sufficient Dram Shop Action That Survives Independent of David Sanders's Claim

Appellant is incorrect that Heather Sanders only alleged a derivative claim under Count VIII of the Complaint. While Heather Sanders has a valid loss of consortium claim as it relates to the assault, battery, premises liability, and other tort claims, Counts III and IV are also sufficiently pled by her under the Dram Shop Act:

> "44. The selling, furnishing, or giving of alcohol by Defendant `Tumbleweed Saloon, Inc to Defendants Spohn and Pierce was a direct and proximate cause of DAVID AND HEATHER SANDERS' injuries described in the Complaint.
>
> 45. Plaintiffs in fact suffered the injuries described in the Complaint." [Complaint, emphasis added.]

Paragraphs 48 and 49 also explicitly identify Heather Sanders as advancing a Dram Shop Act claim. While Heather testified that she was not physically injured, she also testified to the stress and mental damages that she experienced as a result of the incident, and that she witnessed her husband's beating and subsequently rushed him to the hospital:

"A [Spohn] proceeded to stomp him in the back of the neck and the head.

Q While David is on the ground?
A While David is on the ground.

Q He stomps him?
A Yes.

Q How many times?
A More than five or six. I mean, it was just a constant over and over again." [Heather Sanders Trans, 54:1-8.]

There is no requirement under the Dram Shop Act that Heather Sanders sustain physical injuries. Plaintiffs agree that a loss of consortium claim was asserted in the notice to Defendant, without separately identifying that claim as a numbered cause of action in the Complaint. This does not, however, bar Heather Sanders from seeking redress for those damages in the Complaint as filed, as particular damages need not be alleged under MCL 436.1801(4). If Appellant was unsure as to whether Heather Sanders intended to seek these damages through the causes of action set forth in the Complaint, a motion for a more definite statement or to amend the Complaint could have been brought, but was not. Heather Sanders is not barred from seeking these damages from the various counts in the Complaint to which she is a party.

CONCLUSION

Appellant fails to meet this Court's threshold of justiciability where the Court of Appeals engaged in a straightforward application of longstanding Michigan jurisprudence. Granting this Application and the relief requested by Appellant would

undermine fundamental principles of agency and the attorney-client relationship, putting every person with the capacity to contract in Michigan in jeopardy of being bound by the unknown, unauthorized, unilateral acts of third-party "agents." Wherefore, Appellee requests that this Court DENY Appellant's Application for Leave to Appeal.

Respectfully Submitted,

RANIERI, HANLEY & HODEK, PLC

Dated: December 21, 2018

By: /s/Matthew T. Hanley

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